

Message Text

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ACTION EUR-12

INFO OCT-01 ISO-00 AID-05 CEA-01 CIAE-00 COME-00 EB-08
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FM USMISSION OECD PARIS
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PASS DEPARTMENT OF TREASURY

E.O. 11652: N/A
TAGS: EFIN, ECON, OECD
SUBJECT: EXEMPTION FOR SPECIAL CUSTOMS OR MONETARY
SYSTEMS FROM NON-DISCRIMINATION OBLIGATION OF OECD
CODES OF LIBERALIZATION

REF: A) OECD 4054; B) STATE 158363 (1976);
C) DAF/INV/77.15; D) DAF/INV/76.23 AND ADDENDA 1-5;
E) OECD 9561; F) OECD 36277 (1976); G) OECD
30936 (1976); H) STATE 289787 (1976)

1. SUMMARY. WORKING GROUP (WG) OF INVISIBLES COMMITTEE
(IC) WILL MEET MAY 23 TO ATTEMPT TO NARROW DIFFERENCES
AND POSSIBLY TO REACH COMMON POSITION ON SCOPE FOR
DISCRIMINATION PERMITTED UNDER OECD LIBERALIZATION
CODES. U.S. MEMBER PROPOSES TO HOLD FAST AGAINST
DISCRIMINATORY "DELIBERALIZATION" STEPS BUT TO CONCEDE
SOME SCOPE FOR DISCRIMINATION UNDER ARTICLE 10 IN CASES
WHEN RESERVATIONS ARE BEING REDUCED, PROVIDED THAT
SUITABLE CONDITIONS BE ATTACHED TO ENSURE INTER ALIA
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THAT A) SUCH DISCRIMINATION IS AN INHERENT REQUIREMENT
OF MEMBERSHIP IN A CUSTOMS OR MONETARY UNION; AND B)
RAPID PROGRESS TOWARD REMOVAL OF THE DISCRIMINATORY
RESTRICTIONS IS LIKELY. ACTION REQUESTED: CONFIRMATION
OF SUGGESTED LINE OR ALTERNATIVE INSTRUCTIONS. END
SUMMARY.

2. BACKGROUND. WASHINGTON AGENCIES WILL RECALL THAT THE INVISIBLES COMMITTEE HAS NEVER BEEN ABLE TO REACH AGREEMENT ON QUESTION OF SCOPE PERMITTED BY OECD LIBERALIZATION CODES FOR MORE LIBERAL TREATMENT BY MEMBERS OF SPECIAL CUSTOMS OR MONETARY UNIONS (IN EFFECT EUROPEAN COMMUNITY) WITH RESPECT TO INVISIBLE OPERATIONS AND CAPITAL MOVEMENTS AMONG THEMSELVES THAN THOSE ACCORDED TO OTHER OECD MEMBERS. SINCE BEING FACED IN EARLY 1976 WITH SPECIFIC CASE OF DISCRIMINATORY RESTRICTION BY ITALY OF OUTWARD PORTFOLIO OPERATION IN REAL ESTATE, IC HAS BEEN MAKING RENEWED ATTEMPT TO IDENTIFY ISSUES INVOLVED AND SEE IF AGREEMENT CAN BE REACHED, AT LEAST ON SOME ASPECTS OF THIS COMPLEX ISSUE. A CERTAIN MOMENTUM HAS BUILT UP IN TERMS OF IC MEMBERS' FAMILIARIZING THEMSELVES WITH THE ISSUE AND EXPRESSING OPINIONS, AND THERE APPEARS TO BE AN OPPORTUNITY AVAILABLE TO PROCEED TOWARD AN UNDERSTANDING. MEETING ON MAY 23 OF INFORMAL WG OF IC PRESENTS OCCASION WHEN WE BELIEVE SUCH MOMENTUM CAN BE GIVEN FURTHER IMPETUS IF WE ARE WILLING TO CONTRIBUTE TO A COMPROMISE OF VIEWS. OTHERWISE, IF NO PROGRESS MADE AT THAT TIME, ISSUE MAY AGAIN BE PLACED ON THE SHELF. ALTHOUGH MEMBERS OF IC DE JURE SPEAK ONLY IN A PERSONAL CAPACITY (FORMAL GOVERNMENT POSITIONS BEING RECORDED AT SUBSEQUENT REVIEW BY PAYMENTS COMMITTEE AND, ULTIMATELY, IN EXECUTIVE COMMITTEE AND COUNCIL), IT WOULD APPEAR ESSENTIAL THAT U.S. MEMBER HAVE OFFICIAL WASHINGTON GUIDANCE FOR MAY 23 MEETING.

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3. POSITIONS OF VARIOUS IC MEMBERS (ONLY ABOUT HALF HAVE EXPRESSED THEMSELVES) ARE REFLECTED MAINLY IN REFS A AND D, AND REF C IS EFFORT BY SECRETARIAT (STEIN: LEGAL SERVICE) TO SUMMARIZE KEY AREAS OF DIFFERENCE. POSITION OF U.S. MEMBER AND ALTERNATE IS CONTAINED IN REF D (ADDENDUM 5) AND IS BASED PRIMARILY ON PRELIMINARY INSTRUCTIONS CONVEYED IN REF B AS ELABORATED IN SUBSEQUENT CABLE EXCHANGES (REFS F-H). REF C IN SEVERAL RESPECTS IS AN INACCURATE DESCRIPTION OF DISCUSSIONS TO DATE; ADVANCE COPY OF U.S. MEMBER'S COMMENTS THEREON IS BEING MAILED TO TREASURY/ALTHEIM (BELGIAN MEMBER'S COMMENTS ALREADY MAILED -- OTHER MEMBERS' COMMENTS WILL BE SENT IF AND WHEN RECEIVED.)

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4. AS NOTED REF A AND REFLECTED IN REF C, U.S. MEMBER IS ISOLATED IN CONTENDING THAT ONLY CLEAR SCOPE FOR APPLICATION OF ARTICLE 10 IS WITH RESPECT TO OPERATIONS OTHER THAN THOSE TO WHICH LIBERALIZATION OBLIGATIONS OF ARTICLE 2(A) APPLY (I.E., THOSE SPECIFIED IN ANNEX A OF CODES). SINCE ARTICLE 9 (NON-DISCRIMINATION OBLIGATION) REFERS TO OPERATIONS LISTED IN ANNEX A AND SINCE ARTICLE 10 (EXCEPTION FOR SPECIAL SYSTEMS) IS CLEARLY MEANT TO PROVIDE EXEMPTIONS TO ARTICLE 9, IT IS DIFFICULT TO SUPPORT CONTENTION THAT WORDING OF ARTICLE 9 SHOULD BE INTERPRETED AS AUTHORIZING DISCRIMINATION ONLY FOR OPERATIONS NOT SUBJECT TO LIBERALIZATION OBLIGATION OF 2(A). POSSIBLE DISTINCTION BETWEEN OPERATIONS "LISTED" IN ANNEX A (ARTICLE 9 NOMENCLATURE) AND THOSE "SPECIFIED IN AN ITEM SET OUT" IN ANNEX A (ARTICLE 2(A) NOMENCLATURE), WHICH HAS BEEN EMPHASIZED IN U.S. MEMBER'S PRESENTATIONS, SEEMS TO OFFER THE ONLY ARGUABLE JUSTIFICATION FOR TRADITIONAL U.S. POSITION THAT DISCRIMINATION IS LIMITED OFFICIAL USE

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POSSIBLE ONLY IN LIBERALIZING BEYOND OBLIGATIONS OF 2(A); HOWEVER, THIS AREA OF POTENTIAL DISTINCTION IS RATHER MEAGER AND NOT SPECIFICALLY SUPPORTED IN THE CODES OR THEIR LEGISLATIVE HISTORY. CONSEQUENTLY, IT SEEMS NECESSARY TO MAKE SOME CONCESSION TO EC MEMBERS,

WHO POLITICALLY WILL FIND IT DIFFICULT TO AGREE TO
HIGHLY RESTRICTIVE INTERPRETATION OF ARTICLE 10.

5. ANSWER WOULD SEEM TO LIE IN AGREEING, IN PRINCIPLE,
TO POSSIBILITY OF APPLYING ARTICLE 10 TO OPERATIONS
SUBJECT TO LIBERALIZATION UNDER 2(A), BUT ONLY WHEN
LEVEL OF LIBERALIZATION IS INCREASED (I.E., RESERVA-
TIONS REMOVED OR LIMITED). THIS ESSENTIALLY MEANS
THAT ARTICLE 10 COULD NOT BE APPLIED IN THE CONTEXT
OF DEROGATIONS (ARTICLE 7(E) REINFORCES SUCH A PROHI-
BITION). HOWEVER, FOR CAPITAL MOVEMENTS CODE, QUESTION
ARISES AS TO TREATMENT OF ITEMS IN LIST B OF ANNEX A,
ON WHICH RESERVATIONS CAN BE LODGED AT ANY TIME. THE
ARGUMENT HERE IS THAT HYPOTHETICALLY A COUNTRY COULD
RESTRICT A LIBERALIZED ITEM VIS-A-VIS ALL OECD MEMBERS
AND THEN RELIBERALIZE ONLY WITH RESPECT TO SPECIAL
SYSTEMS' MEMBERS; HENCE, (ACCORDING TO SOME MEMBERS)
IT SHOULD BE POSSIBLE FOR THE COUNTRY DIRECTLY TO
DISCRIMINATE IN DELIBERALIZATION, RATHER THAN RESORTING
TO CIRCUITOUS DEVICE WHICH BRINGS ABOUT SAME RESULT.
SOME SUPPORT EXISTS IN IC, HOWEVER, FOR REJECTING SUCH
INDIRECT DISCRIMINATORY DELIBERALIZATION.

6. OUR RECOMMENDATION, THEREFORE, IS TO ACCEPT
(RELUCTANTLY) POSSIBILITY OF APPLYING ARTICLE 10 IN
THE PROCESS OF COMPLYING WITH ARTICLE 2(A) BUT ONLY
WHERE THIS ENTAILS A NET INCREASE IN LIBERALIZATION.
IN DOING SO, HOWEVER, WE SHOULD INSIST ON ADEQUATE
JUSTIFICATION IN EACH CASE, ALONG LINES SET OUT IN
PARAS 17-22 OF NOTE OF U.S. MEMBER AND ALTERNATE --
E.G., DISCRIMINATION MUST ARISE AS AN INHERENT CONSE-
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QUENCE OF MEMBERSHIP IN A SPECIAL SYSTEM, AND THERE
MUST BE CLEAR EVIDENCE OF INTENT TO EXTEND LIBERALIZA-
TION TO OTHER OECD MEMBERS.

7. ACTION REQUESTED. ADVISE BY MAY 20 WHETHER RECOM-
MENDED COURSE OF ACTION IS ACCEPTABLE OR PROVIDE
ALTERNATIVE INSTRUCTIONS.
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